IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

HENRY F. WYMAN, ET AL., *Appellants*, vs. SUMMER WALLACE, ET AL., *Appellees*.	Term No. 191. General No. 19652.
PETER FRENZER, ET AL., *Appellants*, vs. SUMNER WALLACE, ET AL., *Appellees*.	Term No. 192. General No. 19653.
EDGAR M. MORSMAN, *Appellant*, vs. SUMNER WALLACE, ET AL., *Appellees*.	Term No. 193. General No. 19654.
WILLIAM S. POPPLETON, *Appellant*, vs. SUMNER WALLACE, ET AL., *Appellee*,	Term No. 194. General No. 19655.
GEORGE W. MCCLELLAN, as Executor etc., et al., *Appellants*, vs. SUMNER WALLACE, ET AL., *Appellees*.	Term No. 195. General No. 19656.

And Other Appeals From the Same Decree.

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF APPELLEES.

JAMES M. WOOLWORTH,
R. S. HALL,
For Appellees.

I

STATEMENT.

The facts in this case, as disclosed by the amended bill and the evidence, are that the American National Bank and the Union National Bank were, on and prior to the 21st day of December, 1895, each engaged in business in the City of Omaha, Nebraska.

That during the month of December the American National Bank was in such financial condition that it became necessary for it to provide in some manner for the payment of a large amount of deposits on or about January 1st, 1896, and that it did not have on hand sufficient funds with which to meet the demands which it knew would be made upon it at that time, and which if not paid would precipitate a demand by all of its depositors and thus bring on a failure of the bank with all the disastrous consequences which inevitably follow such failures.

This being the condition of the American National Bank, the officers of the Bank and leading stockholders entered into negotiations with the Union National Bank, with a view to affording relief to the American, whereby its immediate obligations should be paid ,its depositors fully protected and paid and an opportunity given to realize upon its assets.

That as a result of such negotiations, a contract was entered into between the two banks by and through the Board of Directors of each.

(See minutes of meeting of Board of Directors of American National, Exhibit 7, p. 255, Record.)

The agreement thus authorized by the Board of Directors is as follows:

AGREEMENT.

"This indenture witnesseth: That the American National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the first part, has and by these presents does hereby agree, for the considerations hereinafter expressed, to and with Union National Bank, a corporation of Omaha, Nebraska, hereinafter designated party of the second part, as follows, to-wit:

"First. The party of the first part hereby agrees to sell and assign and does hereby sell and assign to the second party the business of the party of the first part, its cash on hand, office furniture and fixtures and such of its bills receivable, as the party of the second part on examination may be willing to take as cash without recourse on the party of the first part.

"Second. The party of the second part hereby agrees to purchase and does purchase from the party of the first part the business of the party of the first part, cash on hand, office furniture and fixtures, and such bills receivable as the party of the second part may be willing to take as cash on examination of the same without recourse on the party of the first part and to pay the party of the first part for said office furniture and fixtures the sum of Three thousand seven hundred and fifty dollars ($3,750.00), and to assume the liabilities of the party of the first part to its depositors and on account of its bills payable and to liquidate the remaining assets of the party of the first part which may not be taken and received as cash by the party of the second part without charge or expense to the party of the first part, except such court charges and attorneys fees as may be found necessary and that such liquidation shall be conducted under the direction of Thomas L. Kimball, or such other person as may be agreed upon on behalf of the stockholders of the party of the first

part, **it be ing understood and agreed that said Kimball, or his successor, shall represent in said liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorney' fees attending said liquidation shall be incurred under the direction of said Kimball, or his successor.** (Black type ours.)

"Third. In consideration of the above agreement of the party of the second part, the party of the first part hereby agrees to sustain and pay one-half of the loss and expense which the party of the second part may sustain on account of removal from its present quarters by reason of its unexpired lease on its present place of business, and one half of the loss which the party of the second part may sustain on the sale of its office furniture and fixtures, which furniture and fixtures are agreed upon at the present price and value of three thousand seven hundred and fifty ($3,750.00) dollars, and the party of the first part further agrees and does hereby guarantee the party of the second part against any and all loss on account of assuming the liabilities of the party of the first part as aforesaid. And to this end the party of the first part agrees to execute and deliver to the party of the second part its three promissory notes of equal sums for the amount of liabilities which the party of the second part may assume after crediting the full amount of cash on hand and bills receivable and other assets which may be accepted by the party of the second part on examination, which notes shall draw interest from date at the rate of six

per cent. per annum, payable quarter annually, and be payable in one, two and three years from date respectively, and shall be non-negotiable. And in case of non-payment of any of said notes when due the whole of said principle sums of all of said notes and accrued interest shall thereupon become due.

"And as further security to the party of the second part, the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection therefrom by the party of the second part heretofore mentioned, including all its bills receivable, stocks, bonds, personal property of every kind, and all real estate and interests therein or liens thereon, **with the understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the purposes hereinbefore expressed.** (Black type ours.)

"And it is further agreed that the party of the first part may pay and have credited on said notes at any time prior to maturity any sums of money of five hundred ($500.00) dollars and upward, provided the sums so paid shall be in even hundreds.

"Witness the names and corporate seals of the parties hereto this 21st day of December, A. D., 1895.

"Now, therefore, resolved that the foregoing agreement be and the same is hereby ratified and confirmed and that the officers of the bank be and are hereby authorized and directed to execute said agreement and carry the same into effect for and on behalf of this bank, and that the officers of this bank be and are hereby authorized to execute and deliver to the Union National Bank the notes of this bank in the sums which may be

required to comply with the terms of the foregoing agreement."

The Union National Bank received from the American National Bank certain cash and cash assets, and certain discounted notes which it received as cash and assumed and agreed to pay, and did pay the deposits and bills payable and other indebtedness of the American to the amount in round numbers of $240,000.00, and the amount of cash and cash assets received by it, being in round numbers the sum of $39,000.00. The American, according to the agreement, gave its three promissory, non-negotiable notes for the sum of $67,000.00 each, payable in one, two and three years. The remaining assets of the American stock the Union took as security for this $201,000.00. The Union National paid all of said $289,000.00 of liabilities.

(See Wyman's testimony, page 169.)

The language of the contract as to said assets being taken as security is as follows: "And as further security to the party of the second part, the party of the first part agrees to sell and assign and does hereby sell and assign to the party of the second part all of its assets which may remain after the selection thereof by the party of the second part heretofore mentioned, including all its bills payable, stock, bonds, personal property of every kind, and all real estate and rights and interest therein or liens thereon, with the *understanding and agreement that the party of the second part shall have and hold said assets and properties subject to the right of said Thomas L. Kimball or his successors to collect and convert the same into cash for the use and purposes heretofore expressed.*"

Thomas L. Kimball mentioned in the agreement as Trustee was the president of the American National.

This agreement was signed on the 21st day of December,

1895, and on January 14th, 1896, the stockholders of the American National held their annual meeting.

At this meeting the action of the Board of Directors in making this contract was taken up and discussed.

(See Exhibit 9, being minutes of stockholder's meeting, pp. 256, 260, 261, Record.)

The capital stock of the American was $200,000, divided into 2,000 shares of $100 each.

The total representation at the meeting was 1665¾ shares out of a possible 2,000 shares.

In the record we find the following (page 260):

"Gen. Manderson said that he hoped before any other business was brought before the meeting there would be made to the stockholders a statement of the circumstances which led up to the agreement with the Union National Bank.

"The agreement entered into between the directors of the American and Union National Banks was read.

"Mr. Kimball made a statement of the conditiions that confronted the American in December, 1895, and the *necessity* for taking advantage of the opportunity that was offered whereby the depositors of the Bank would be *protected,* the immediate obligations of the bank *paid* and time given the bank to realize on its assets."

The record then recites the names of a large number of stockholders expressing satisfaction at the action of the directors, and that they had acted for the best interests of the stockholders.

(Record, page 260.)

At the same meeting the following resolution was adopted by a vote of 1609½ for out of 1665¾ represented, and being more than three-fourths of the total stock.

The resolution is as follows:

> "Resolved, that the directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law.

(See page 261.)

Afterward, on January 17th, 1896, the Directors held a meeting at which the following resolution was unanimously adopted, to-wit:

> "Resolved, that a meeting of the shareholders of the American National Bank of Omaha, Nebraska, be called for the 25th day of February, 1896, for the purpose of considering and voting upon the following resolution, to-wit:
>
> "Resolved, That the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of Sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be and he hereby is appointed the agent of the shareholders of said bank to effect such liquidation."

(See Record, pp. 261-262.)

Each stockholder was then notified of such meeting, the notice being given on January 20th, 1896.

(See Record, p. 262-263.)

The stockholders then came together on February 25th, 1896, in pursuance of said call and notice, with 1696 out of the full 2000 shares represented, and 1639¾ shares voted for the following resolution:

> "Resolved, That the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation under the provisions of Sections 5220 and 5221, U. S.

Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be and hereby is appointed the agent and trustee of the shareholders to affect such liquidation."

(See Exhibits 14 and 15 Record, pp. 264-5-6.)

The necessary steps were then taken to comply with the requirements of the Comptroller of the Currency and the notices required by law were published.

(See record, pp. 267-8-9-270.)

Mr. Kimball, thus being the trustee under the agreement and the agent and trustee for the stockholders, together with Henry F. Wyman, cashier of the American, proceeded to handle and collect the assets held as security for the debts of the bank, and on January 12, 1897, being at the end of the first year, made their annual report to the stockholders, which report is Exhibit 24.

(See Exhibit 24, p. 274, record.)

Mr. Wyman, upon being questioned with reference to this report, testified as follows:

"Q. Calling your attention to this record which has just been offered in evidence, Exhibit 24, and particularly to the report embodied in it * * * you may state what that report is, it is a comparative statement between what dates?'

"A. It is a comparative statement of the bank between December 21st, 1895, and January 1st, 1897.

Q. Calling your attention to the item in that report under the heading of December 21st, 1895, and of deposits $239,947.67, you may state what had become of those deposits, they not appearing in your opposite side of January 1st, 1897?

A. They had apparently been paid.

Q. Well, are you able to state in what way they

were paid, are those the deposits that were assumed by the Union National Bank?

A. Yes, sir.

Q. So, when you say they were paid, you mean they were paid by the consummation of the contract which has been referred to?

A. Yes, sir.

Q. Calling your attention to the bills payable, $50,000, under date of December 21st, 1895, and to the bills payable of $184,000, under date of January 1st, 1897, you may state how that difference was made up, if you know?

A. The $184,000 represented the notes given by The American National Bank to the Union National Bank, the $50,000 under date of December 21st, 1895, having been disposed of, paid.

Q. And by whom was that paid?

A. By the Union National Bank.

Q. Now, when you say the $184,000 represents the notes, given, do you refer to these three notes, Exhibits '2,' '3' and '4'?

A. Yes, I refer to that amount which was at that time unpaid on those notes.

(See Wyman's testimony, pp. 169-170.)

The same witness testified as to the giving of the three notes aggregating $201,000, as follows:

Q. Well, you misunderstood my question, I think. What method was pursued which resulted in the giving of these three notes, Exhibits '2,' '3' and '4'?

A. I do not believe I know just what you are getting at.

Q. How did you arrive at these amounts?

A. We aggregated the indebtedness of the American National Bank and deducted from that the amount

of cash and notes that the Union National Bank took into its—the amount of cash it took into its cash and the amount of notes it took into its bills receivable, the notes it assumed as a part of its own notes.

Q. When you say any notes it assumed as part of its own notes, do you mean notes that were then held by the American National Bank and which the Union National Bank was willing to take at their face?

A. Yes, sir.

Q. So they took certain notes of the American just the same as they took cash?

A. Yes, sir.

Q. And then the $201,000 was arrived at by taking the difference between the amount of cash and cash securities which the Union National Bank took and the liabilities which it assumed, is that right?

A. That is right."

This action was commenced in August, 1898, and brought by Sumner Wallace, assignee of one of the notes, on behalf of himself and all other creditors of the American National Bank under authority of Sec. 2, of the Act of Congress, approved June 30, 1876, providing for the enforcement of the individual liability of shareholders of a National Bank which has gone into voluntary liquidation under the provisions of R. S. Sec. 5220.

It was alleged in the Amended Bill that Wallace was the owner of one of the three promissory notes of $67,000 each, which made up the $201,000, and that the Union National was the owner of the other two notes. The contract was set out in the Amended Bill, and the Union National was made a defendant, as was also the American National and Kimball the trustee.

It will be seen by the allegations of the Bill and the evi-

dence in the record that the indebtedness of the American was paid by the Union under the contract, and that in reality the only debt of the American remaining was the indebtedness created by such payment and owing to Wallace the complainant and to the Union National Bank, and that in order to make a fair and equitable assessment against the stockholders the assets should be sold in order that they might get the benefit of whatever of value remained.

In addition to the allegation in the Amended Bill that the Union National was the owner and holder of the other two notes, the Union National in its answer filed to the Amended Bill set out its claim and asked that the relief prayed for in the Amended Bill be for its benefit as well as one of the creditors in whose behalf the action was brought.

Before referring to the points argued in the briefs of counsel, we wish now to summarize what the undisputed evidence shows as gathered from the record and the admitted facts in this case. The appellants seem to depend upon their ability to reverse this case upon legal propositions, and in discussing them do not seem to take into account the facts. They are, as we think, absolutely undisputed, and are as follows:

1. The Union National under this contract assumed to pay and did pay liabilities of the American National to the extent of $201,000 over and above what it got from the American under the contract.

2. All of the depositor's accounts and all of the bills payable of the American were thus provided for and paid.

(See record, pp. 169-170.)

3. This excess was at the time of the transaction definitely ascertained and fixed and acknowledged by the American National by giving to the Union National its three promissory notes, each for the sum of $67,000.

4. This indebtedness thus acknowledged at that time

was contracted under the direction and control and by resolution of the governing body of the American National, its Board of Directors, and the agreement authorized to be signed by its officers embodied in the minutes of the meeting.

(Record, pp. 255-6-7.)

5. At a meeting of practically all of the stockholders within about three weeks thereafter the whole situation was laid before them and fully explained.

(Record, pp. 258-9-60.)

6. After such explanation the stockholders recognized the action of the Directors as being for the best interests of the Bank and acted under the contract, and instructed the Directors to take action looking to the liquidation of the Bank's affairs.

(Record, p. 261.)

7. The stockholders, at a subsequent meeting in February of the same year, voted practically unanimously to go into voluntary liquidation and appointed the President, Thomas L. Kimball, the agent and Trustee of the shareholders, the same party who was Trustee under the contract.

(Record, p. 264.)

8. That the next year, 1897, at the annual meeting of the stockholders, a report was made by the Cashier, Henry F. Wyman, attested by the Trustee and agent, Kimball, showing the condition of the Bank's affairs which fully recited what was being done under the contract and in liquidating the affairs of the bank; this report showing that all the bank's indebtedness had been fully cared for by the Union National, and that the bank owed the Union National upon the notes $184,000 at that time, and that all the Bank's other indebtedness had been paid by the Union National. This report was approved by the unanimous action of the stockholders.

(Record, p. 274, Ex. 24, and testimony of Wyman, pp. 169-70.)

ARGUMENT:

The First Point Argued in the Brief of Counsel Morsman is the General Proposition that the Circuit Court Had no Jurisdiction.

1. Because there is no diverse citizenship.

2. Because Section 2 of the Act of June 30, 1876, is repealed by Section 6 of Act of August 13, 1888.

Because the proceedings of the American National were a mere form.

3. Because the suit could only be brought by the United States and that the American National Bank was a necessary party.

We do not claim in this case that the Court has jurisdiction because Wallace, who brought this suit on behalf of himself and all other creditors, is a citizen of New Hampshire, but that the Court has jurisdiction by reason of the law relating to the liability of stockholders of Banks in voluntary liquidation.

While it is true that we are seeking to enforce an obligation of the American National Bank, we are enforcing it against the stockholders of that Bank. We do not need to be a *judgment* creditor of the Bank before bringing such action, but we bring it under Section 2, of the Act of June 30, 1876, which is as follows:

> "That when any national banking association shall have gone into voluntary liquidation under the provisions of Section five thousand two hundred and twenty of said Statutes, the individual liability of the shareholders provided for by Section fifty-one hundred and fifty-one of said Statutes may be enforced by any creditor of said association by bill in equity in the nature

> of a creditor's bill brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

Act of June 30, 1876, 19 Stat., 63.
U. S. Comp. Stat. 1901, p. 3509.

This is a law granting the right of a creditor to sue the stockholders of a National Bank that has gone into voluntary liquidation. There is nothing in this Act about suing the Bank itself, and yet counsel claims that the Act of 1882 repealed this Section of the Act of 1876.

The law of 1882 simply made the jurisdiction as to National Banks the same as to other banks not organized under the laws of the United States. It did not refer to stockholders liability nor to the rights of creditors as against the stockholders. The jurisdiction of the Circuit Court in suits brought by creditors to enforce stockholders' liability at the time of the passage of the law of 1882, depended upon Section 2, of the Act of 1876, but the jurisdiction as to the bank itself did not depend upon that section, but upon Section 57, of the Act of June 3, 1864, 13 Stat. 116, which gave the Circuit Court jurisdiction of "all suits by or against any banking association established in the District where the Court is held under any law providing for National Banking Associations."

So that when the Act of 1882 was passed, it took away this general jurisdiction over National Banks, but it did not pretend to effect Section 2, of the Act of 1876, which gave a right of action by a creditor of a National Bank in liquidation on behalf of himself and all other creditors against the shareholders of such bank.

Counsel in his argument assumes that Section 2, of the

Act of 1876, refers to the jurisdiction of the Courts as to the bank, whereas it simply refers to and grants a right of action to a creditor against the shareholders of banks in liquidation, and this right does not depend upon citizenship, but must be brought in the Circuit Court having original jurisdiction in equity where the Bank was located. This act has never been repealed either expressly or by implication.

There is nothing in the Act of 1876 which requires the Bank to be made a party to an action brought under its provisions against the shareholders, but it is probably a necessary party.

The Act of 1876 giving a right of action by creditors against stockholders regardless of citizenship, let us see what the law was as to jurisdiction of the *bank* at the time this action was brought. The law of 1888 was in force at that time, which was as follows:

> "Sec. 4. That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are, respectively, located.
>
> "And in such cases, the Circuit and District Courts shall not have jurisdiction, other than such as they would have in cases *between individual citizens of the same state.*
>
> "The provisions of this Section shall not be held to affect the jurisdiction of the Courts of the United States in cases commenced by the United States or directors or any officers thereof, or cases for winding up the affairs of any such bank."

So that this very Act, in force when this action was begun, reserves to the Court, jurisdiction over National Banks

when they would have jurisdiction between citizens of the same state.

The Court, then, having jurisdiction between creditors and stockholders being citizens of the same state, with regard to the stockholders' liability would have jurisdiction over the bank if necessary or desirable to make it a party. But also, under the circumstances of this case, so far as the Bank is concerned, it would come under the other exception that it was a winding up of the affairs.

The Court, therefore, having jurisdiction between citizens of the same state, with reference to a bank in voluntary liquidation clearly has jurisdiction over the bank and the case, so far as the bank is concerned, comes within both of the exceptions found in Section 4, of the Act of 1888.

Counsel admits that in *King vs. Pomeroy*, 121 Fed. 287, and in *Williamson vs. American Bank*, 115 Fed. 793, the jurisdiction of the Circuit Court in such cases was recognized, but undertakes to argue that this question was not before the Court.

The opinion in *King vs. Pomeroy* was written by Justice Sanborn, and approves the decision in *Williamson vs. American Bank*, 115 Fed., in so far as it held that the Court would have jurisdiction under the Act of 1876, but unlike the Williamson case, held that it was not exclusive.

He says on page 295, 121 Fed.:

> "In *Williamson vs. American Bank*, 115 Feb. 793, 52 C. C. A., 1 the assignee of a national bank located at Ashville, in the State of North Carolina, which was in voluntary liquidation, and a creditor of that bank, exhibited a bill in equity to the judges of the Circuit Court of the District of South Carolina on behaf of himself and all other creditors against a single share-

holder of the insolvent bank and his trustee to enforce the shareholder's liability, and the Court sustained a demurrer to the bill. It is plain that the demurrer was properly sustained, because the insolvent bank was a necessary party in the first instance to any suit to enforce the liability of its shareholders, and it was not made a party to that proceeding. The ascertainment of the debts and liabilities of the bank and the judicial determination of the necessity and the requisite extent of the enforcement of the stockholders' liability, are essential prerequisites to the collection of the amounts owing by them and the insolvent bank is a necessary party to these adjudications."

This Court, therefore, had directly before it the question in that case of the construction to be given to the Act of 1876, because it had been decided in Circuit Court of Appeals, Fourth Circuit, that the Act of 1876 was *exclusive* as to enforcement of shareholders' liability, while this Court held it a cumulative remedy and did not prevent enforcement being made by a receiver.

The fourth paragraph of the syllabus in the *King vs. Pomeroy* case is:

> "The remedy of a creditor's bill to enforce the liability of shareholders of national banks in voluntary liquidation provided by Section 2 of the Act of June 30, 1876, c. 156, 19 Stat. 63, (U. S. Comp. Stat., 1901, p. 3509), is cumulative and not exclusive."

In the opinion in this same case Justice Sanborn, in speaking of the effect of the Act of 1876, says, (p. 292):

> "It simply extends to every creditor a remedy which creditors *other* than that of the location of the *bank* had before it was enacted."

King vs. Pomeroy, 121 U. S., 287.

The syllabus in the Williamson case is as follows:

> "When a national bank goes into voluntary liquidation the only authorized procedure for the enforcement of the individual liability of its stockholders is that prescribed by Act June 30, 1876 (19 St. 63), by a suit in equity in the nature of a creditor's suit brought on behalf of all creditors in a Court for the district in which the bank is located, in which the necessity and extent of the ratable enforcement of the stockholders' liability shall be determined. Such suit should be against the bank, and all of its stockholders, and in case ancillary proceedings should be necessary for the collection from non-resident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should be authorized by the Court of original jurisdiction and brought by a receiver or other person appointed by such Court."
>
> *Williamson vs. American Bank, et al.*, 115 Fed., 793.

But, aside from the foregoing considerations, the Circuit Court would have jurisdiction because this is a statutory action arising under the laws of the United States, and for that reason alone the court had jurisdiction.

Counsel invokes the rule that it is *necessary* to ascertain the indebtedness of the bank, its creditors, etc.

In another portion of his brief he argues that the contract of the American was *ultra vires.*

He also argues that the American National did not go into voluntary liquidation.

He also argues that this is not such a "contract debt or engagement of the bank" as is contemplated in stockholders' liability mentioned in Sec. 5151.

So that the various sections of the Banking Law are involved in this action. The bill itself is based upon a liability growing out of the banking laws of the United States. It shows upon its face that the questions in the case grow out

of federal laws. It comes directly within the first sub-division of Section 629, Rev. Stat., which says that: "The Circuit Court of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States," etc.

This action depends absolutely upon a law of the United States. It is based upon the liability fixed by Section 5151, whereby a stockholder is made liable for the "contracts, debts and engagements of the bank," and upon Section 2 of the Act of 1876, which authorized a creditor to bring a suit on behalf of himself and all other creditors of a bank in voluntary liquidation. The rights of the creditors depend upon the meaning of these various sections of the Banking Law.

A suit arises under the constitution and laws of the United States whenever its correct decision depends upon the construction of either.

Cohens vs. Virginia, 6 Wheat., 262.

> "A case arises under that constitution not merely when a party comes into Court to demand something conferred upon him by the constitution, a law of the United States or a treaty, but whenever its correct decision as to the right, privilege, claim, protection or defense of a party in whole or in part depends upon the construction of either."

Tennessee vs. Davis, 100 U. S., p. 258 (6 Par. of syllabus.)

> "When it appears in a suit that some title, right, privilege or immunity on which recovery depends, will be defeated by one construction of the constitution or laws of the United States or sustained by the oppo-

site construction, the case is one arising under the constitution or laws of the United States, within the meaning of that term as used in the Act of March 3rd, 1875, 18 Stat., 470."

Starin vs. New York, 115 U. S., 249.

In the case of *Southern Pacific R. R. Co. vs. California*, 118 U. S., the court, by Chief Justice Waite, on page 112, says:

"In *Railroad Company vs. Mississippi*, 102 U. S., 135-141, it was decided that a suit brought by a state in one of its own Courts against a corporation of its own creation can be removed to the Circuit Court of the United States under the Act of March 3, 1875, if it is a suit arising under the constitution or laws of the United States, although it may involve questions other than those which depend on the constitution and laws.

"The case of *Arms vs. Kansas*, 111 U. S., 449, is to the same effect, and in *Starin vs. New York*, 115 U. S., 248-257, it was stated as the effect of all the authorities on the subject, that if from the *questions involved in the suit* 'it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States within the meaning of that term, as used in the Act of 1875; otherwise not."

Southern Pacific R. R. Co. vs. California, 118 U. S., 112.

In *Union National Bank vs. Miller, Treas*, 15 Fed., the syllabus of the case is as follows:

"(1) The Act of July 12, 1882, to enable national banks to extend their corporate existence, placed na-

tional banks and other banks as to their right to sue in the Federal Courts upon the same footing, and consequently national banks cannot, in virtue of a mere corporate right, sue in other Courts.

"(2) But national banks may, like other banks and citizens, sue in such Courts whenever the subject matter involves some element of Federal jurisdiction. Thus, a suit by a national bank against a county treasurer to enjoin the collection of an excessive tax upon its personal property alleged to have been made in violation of the Act of Congress permitting the state to tax national banks, presents a case arising under a law of Congress, and is, therefore, maintainable in a Federal Court."

Union National Bank vs. Miller, Treas., 15 Fed., 703.

It is apparent, going back now to the Act of 1882, that even under that act a state bank, if it were a creditor of a national bank in voluntary liquidation, could sue under the act of 1876 in the Federal Court, and if, as this court has already decided in the Pomeroy case, the national bank is a necessary party to such an action, can it be doubted that the court in such an action would have jurisdiction of the national bank?

The language of the Act of 1882 is that the jurisdiction "shall be the same as and not other than the jurisdiction for suits by or against a bank not organized under the laws of the United States." (22 Stat., 162.)

Before the passage of this act the Court had jurisdiction of all suits against national banks. Before the passage of this act the law of 1876 is conceded by counsel to have been in full force and effect.

If a state bank, after the passage of this act, had a claim against a national bank in voluntary liquidation, although it

were a citizen of the same state, it could bring an action under the 1876 act against the stockholders, and if it could, the Court having jurisdiction to allow *it* to bring such a suit, it could join the National Bank as a party if, as counsel claims, it is necessary that it be a party.

In other words, the law of 1876 would allow a state bank to sue in the Federal Court, though a citizen of the same state as the stockholders sued, and as the 1882 act reserved jurisdiction of national Banks in cases where it would have jurisdiction of State Banks, the bank could be sued in that kind of a case.

So that if we look at this question of jurisdiction from the point of the 1882 law, the 1888 law, or from the view that the whole suit is founded upon Federal statutes and involve their interpretation and meaning, the Court had jurisdiction.

The Bank is not in this Court complaining about lack of jurisdiction. It did not appeal, and the argument of counsel that the Act of 1876 is repealed by implication by the Act of 1882 is, we are convinced, an argument that cannot for a moment be sustained.

II

Counsel claims that the statutory liability of shareholders cannot be extended to any obligation arising out of the agreement of December 21, 1895, or to anything done pursuant to it.

This contract is clear enough in its terms, and taken in connection with the testimony shows that the American National, at the time of its execution, was in an embarrassed condition, that it was under necessity to make provision for caring for its depositors, and that the Directors were well aware of the entire situation and the straits to which the bank

was put. While it is true the negotiations were commenced by the officers of the bank, those representing the largest holdings, the making of the contract was done by order of the Board of Directors, the governing body of the Bank.

Mr. Morsman, in his statement, says (p. 2, brief): "At that date the American National was embarrassed." Knowing the situation of the Bank, the Board of Directors direccted the making of the contract December 25, 1895.

(P. 255 Record, Exhibit 7.)

A few days thereafter the annual stockholders' meeting was held (June 14th, 1896), with 1665¾ shares of stock represented out of 2000 shares, the full stock of the bank.

At that meeting the President of the American National, after the agreement which had been entered into by the Directors of the American National had been read in full, made the following statement:

> "Mr. Kimball made a statement of the conditions that confronted the American in December, 1895, and the necessity for promptly taking of the opportunity that offered, whereby the depositors of the bank would be protected, the immediate obligations of the bank paid and time given the bank to realize on its assets."

(Ex. 9, p. 260.)

After hearing this statement from the President the stockholders at the same meeting passed the following resolution:

> "Resolved, That the Directors of the American National Bank of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law."

(Exhibit 9, p. 261.)

Afterward all the necessary preliminary steps were taken to put the affairs of the Bank into voluntary liquidation.

(See Directors' meeting, Ex. 10, p. 261-2.)

(Notice sent to stockholders, Ex. 11, p. 262.)

(Stockholders' meeting, Ex., 14, p. 265.)

At the stockholders' meeting, 1695 votes out of a possible 2000 voted to go into voluntary liquidation.

(Copy of Teller's report at stockholders' meeting, Ex. 15, p. 267.)

(Certificate of Cashier to Comptroller, Ex. 16, p. 267.)

(Approval of Comptroller to liquidation, Ex. 18, 269.)

(Proofs of Publication required by law, Exs. 18-19-22.)

But it is not worth while to call further attention to the action taken by the Bank in going into voluntary liquidation.

It is conceded by Counsel that the necessary steps to put the Bank into voluntary liquidation were taken.

Counsel in the Morsman case (No. 193) says, (p. 23 brief): "The evidence shows it is true that the association went through the *form* of exercising the power conferred by that section, (Section 5220) and taking the steps required by Section 5221; but it was all a sham and pretense."

The word "liquidation" used in Section 2, and in Section 5220, Rev. Stats., "has a definite meaning and presupposes the existence of assets to be liquidated in the manner provided."

It is strange that Counsel should argue that, when the American National went through all the proper forms to voluntarily liquidate the affairs of the Bank, and proceeded thereunder through an agent appointed, that there was nothing to liquidate. They recognized this contract at the very meeting that they voted to instruct the Directors to take the necessary steps to place the bank in voluntary liquidation.

It was read in full and explained and the necessity for making it shown. There were large assets (face value) to

be looked after, which, of course, they hoped would yield much more than enough to pay the notes given to the Union. They amounted (face value) at the time the contract was made, and thus about the time of taking these steps to go into voluntary liquidation, to over $450,000.

They were being handled by and under the direction of Mr. Kimball, the president of the American, Trustee under the agreement, and, by the vote of liquidation, *agent* for the stockholders. So that there was not merely an empty form to go through with, there were assets to look after in the interests of the stockholders.

There is no method pointed out in the National Banking Act as to what a bank shall or may do when about to go into voluntary liquidation.

Section 5220, Rev. Stat., simply says:

> "Any association may go into voluntary liquidation and be closed by a vote of its shareholders owning two-thirds of its stock."

Then follows in subsequent sections what notices must be given, but there is not a word as to how the association is to provide for its indebtedness.

Whatever the association does evidently would be satisfactory to the defendant so long as creditors were provided for, and if these stockholders were satisfied with the provisions made under this contract for payment of the debts of the bank and took the necessary steps to put the bank into voluntary liquidation, and the banking department was satisfied and approved of the liquidation (See Comptroller's letter, Ex. 18, p. 269), surely the stockholders who took the steps cannot be heard to say that they did not go into liquidation.

The foregoing argument shows conclusively jurisdiction to maintain this suit because a law of Congress is to be con-

strued, and second, because the Statute expressly gives the Circuit Court within the District where the Bank is located the jurisdiction, and such being the clear wording of the Statute we cannot conceive how the holding of this Court can be otherwise, so that the thought naturally follows that the specific lien creditor can surely maintain the suit. The Contract gives a lien to the Union National Bank and to the assignee Sumner Wallace by the transfer of the note to him, therefore, by the conceded rule that a special lien gives a right to proceed without judgment, the Court has jurisdiction. The decisions of the United States Supreme Court established the rules that a secured creditor must hold his advantage in having collateral security, and must be paid dividends without regard to his having collateral security subject only to the fact that a full payment exhausts the secured creditors' rights.

Merrill vs. National Bank of Jacksonville, 173 U. S., 131.

The proceeding in this case recognizes the lien upon the assets and the suit asks the sale of the assets and decree for any balance. The fact that the suit is for the benefit of all creditors can make no difference in the vested interest of Wallace and Union National Bank in the assets. No other creditors appearing, there is no question of priority of lien to determine. Not only is the suit founded upon a law of Congress, but the Statute expressly states that any creditor may bring the suit, so it appears to us a useless presumption to contend that the Circuit Court of the United States has no jurisdiction in this case, or that judgment and execution are at all essential to the maintenance of the suit. In *Terry vs. Little*, 11 Otto, 216, the Supreme Court had the question before them on the liability under a State law similar to the legislation creating the liability of stockholders of National Banks, and

Waite, C. J., says: "Each stockholder is bound for his own share and no more. No judgment can be rendered against him for what another should pay. It follows that in an action at law each stockholder must be sued separately. In equity it is different, for there the decree can be worked to suit the exigencies of the case; and each stockholder can be held liable and proceeded against for what he is bound to pay, and no more."

Kennedy vs. Gibson et al., 3 Wall., 498-505.

This seems to us to conclusively dispose of the objection, to the jurisdiction of the Court and to the right of Wallace to bring the suit, he being the creditor and also a creditor having a contract lien, which by the holdings of the Supreme Court is a vested right. To assert that the lien created by the contract in this case cannot be enforced without first suing at law and obtaining judgment, is absurd.

It is true that the contract in this case uses the word "sell," but a reading of the contract will show that nothing was sold except a little furniture. The sum and substance of the contract was for the purpose to enable the American National Bank to borrow money to pay its debts, to pay its depositors and Banks of which the American had borrowed large sums. We cannot let the unfair statements of counsel go unchallenged. We presume that the parties who acted for the two banks were confident that the assets would ultimately pay the sums necessary to save the American National Bank. The wretched worthlessness of the assets of the American was as much a surprise to the Union National Bank as to the defendants in this case. The fact that Mr. Kimball and Mr. Wyman took charge of the collections of the assets of the American indicates the certain caution and care exercised by the American directors. These men were officials and stockholders of the American, fully familiar with all the assets and

had full chance to collect every dollar possible to be collected from the assets. The subsequent facts disclosed show conclusively that the American was in absolute need of this help to pay its depositors and that it would have been simply impossible for the American to have continued with open doors. Counsel complains of the long lapse of time during which that obligation has drawn interest. We respectfully call the Court's attention to the fact that the lapse of time complained of was greatly caused by the defendants prolonging the litigation. A suit with fifty or more defendants drags extremely slow. At the time the American needed to borrow this money it was vital to its interest that this money be furnished it.

We do not question the rule that a National Bank must find its authority in the Statute and that it possesses such power only as the Statute gives either expressly or as incidental to carry out the purposes of its creators. But what are its purposes and objects ? The learned counsel for appellants—Wyman et al., cites *Roberts vs. Hill*, 24 Fed., 571, to show that a National Bank is in contemplation of insolvency when the concern will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations, and thus it was the duty of the directors of the American to have called the attention of the Comptroller to this fact; and then cites *Case vs. Citizen's Bank*, 2 Woods, 23, that a Bank is insolvent only when it is unable to meet the demands actually made upon it. Counsel thus tries to deduce the rule that the Directors of the American would not be justified in doing anything whatever. We apprehend that the banking world, the financial managers of the country, act upon the reasonable rule that the Board of Directors shall take all usual and safe means to prevent the failure of the institution and the closing of its doors, to the damage and distress of depositors. We ask, what, in the light of the subsequent facts in this case, would have been the

result if the wise course adopted by Mr. Kimball had not been taken?

Mr. Baird's testimony shows that the American Directors acted on the fact that the funds of the American were to quite an extent invested in securities upon which quite a time must be taken to realize and that depositors could not be paid by the American without the money was borrowed of the Union National Bank. In the face of the facts, who can doubt the wisdom and fortune also of the Directors of the American borrowing this money? We say borrowing, for we cannot allow ourselves to believe that any practical, legal or judicial mind can sincerely regard the transaction in any other light. The use of the word and idea of a sale is an utter absurdity. The looseness with which the contract was drawn, and the fact that any attorney would leave such important interests designated as a sale is not creditable to his ability or care. The money taken by the American under this contract to pay its depositors and other banks reached the large sum of over $200,000.00, while the sale included $3,500 worth of furniture. We look to the whole contract and the thought of a sale disappears and the transaction stands out clearly as a Bank in necessity borrowing money of another Bank to relieve its wants in this regard. What higher or more strict act of banking can be imagined or require the wisdom of Directors?

The Court of Appeals of the Eighth Circuit had a very similar case before it in *Schofield vs. State National Bank*, 97 Fed., 282, and we adopt the third paragraph of the syllabus, which also might appropriately be used in the present case:

> "A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and

securities is not *ultra vires'* but is within its power conferred by statute to conduct a general banking business.

The doctrine of *ultra vires* would be a most strange rule to invoke when the American National Bank received every dollar borrowed by its Directors under this Contract, had its own chosen and trusted officers to handle and collect its assets pledged to the Union National and the money applied to the payment of depositors and Banks of whom it had obtained money.

What would be thought of an individual who would seek to repudiate such an obligation? The moral law of honor has always been applied by Courts of Justice in their decisions regarding the obligations of institutions as well as the just obligations of men. Corporations and Banking Institutions are only combinations or aggregations of men, and no matter how insistent the stockholders may be to have the bonds of morals weakened and the ends of justice defeated, still the Courts have ever said:

> "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."
>
> *Railway Co. vs. McCarthy*, 96 U. S., 258.

The same great doctrine was enforced with vigor and clearness in the following cases:

Beuseik vs. Thomas, 66 Fed., 104;

American National Bank vs. National Wall Paper Company, 77 Federal, 85.

These cases are replete with wise discussion and citation of authorities, showing the rule to be founded as well in authority as in the fundamental principles of good sense.

In the syllabus to *Aldrich vs. Chemical National Bank*, 176 U. S., 611, we find:

> "A national bank which uses in its business money obtained by its vice-president as a loan to it from another national bank cannot escape liability to account therefor upon the ground that the loan was not negotiated by its directors or that it could not itself have legally borrowed the money."

In the opinion in this leading case of the Supreme Court upon the liability for borrowed money, the Court mentioned the prior case of *Western National Bank vs. Armstrong,* 152 U. S., 346, and say:

> "In *Western National Bank vs. Armstrong,* the fendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice-president. This Court took care in that case to say that it did not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction."

In our case every penny went to discharge the just and necessary debts of the American National Bank. In that case the Supreme Court declared it immaterial whether the borrowing agent had authority or not where the money was used for the use and benefit of the principal, the Bank, seeming to base the opinion upon both the doctrine of estoppel and upon the larger and more general theory that the American National would be "liable for money had and received to its use."

Ditty vs. Dominion National Bank, 22 C. C. A., 376; 75 Fed. Rep., 769.

But in the case at bar the most complete authority existed, for the contract entered into by the American National Bank, was made by the Board of Directors to meet the pressing want of money to pay depositors and pay bills payable, being entered into by the competent authority of the Bank and for a

purpose emphatically of the first requirement in banking and vital to the interest of stockholders. That the assets were worthless to a great extent is the sole misfortune and real cause of this extended litigation. This Court will take judicial notice that many National Banks go out of business and are compelled to borrow large sums of money to pay presently payable debts such as depositors and bills payable, and the closing out of one National Bank and the payment of its depositors by another is a not unfrequent event. And a presumption prevails that the comptroller of the currency has an oversight of the transaction, for certainly his duties are to protect the depositors and to see that the just obligations of the closing Bank are discharged. In the case at bar the record shows a full compliance with the law in the proceeding in voluntary liquidation. The comptroller recognized the acts of the American as being a full compliance with the law for that purpose, and we claim this to be binding upon all the world for the purposes of this case. In fact the counsel admit that all the steps were taken to make a compliance with the law, but claims it was a form without substance—a farce.

Section 2 of the Act of Congress of June 30, 1876, provides:

> "That when any national banking association shall have gone into voluntary liquidation, * * * any creditor of such association may commence a suit in any Court of the United States having original jurisdiction in equity for the District."

The American National Bank had certainly "gone into voluntary liquidation" before the commencement of this case and if every act essential to a complete discharge had not been done, still we cannot see why this suit was not authorized, for the act says: "That when any National Banking Association shall have gone into voluntary liquidation," the suit

may be commenced. The American National Bank, however, did every act required by law and the custom of the comptroller's office. The contention of the counsel that the American did not go into voluntary liquidation is justified neither in fact nor in law, as all acts were done and legally done. Counsel for appellants have made the greatest effort to defeat this case and reverse the decree entered in the Court below upon what they designate as:

Restricted liability of stockholders in National Banks.

Here appellants cite *Schroeder vs. Manufacturing National Bank,* 133 U. S., 67, and *Richmond vs. Irons,* 121 U. S., 27, in support of the general theory that a National Bank may be liable and still the stockholders not necessarily liable. We might not contend with counsel over the existence of the rule of law that a stockholder may go behind a judgment and show that the debt is one for which he as a stockholder is not liable, but we contend that the doctrine has no application to the facts of the case. In the case at bar the obligations of the American were contracted in the very highest act of Banking, that is, for the purpose of paying depositors and other Banks who held its bills for money borrowed. If the Directors of the American National Bank possessed the authority to protect its depositors and to borrow money to discharge the obligations as held in the case of *Schofield vs. State National Bank,* 97 Feb., 282, then the stockholders, of course, will be liable and if the American is liable upon the theory of money had and received to its use and benefit, then we insist that the stockholders are liable also.

> "An action for money had and received is founded upon what the law terms an implied promise to pay what, in good conscience, the defendant is bound to pay. It being his duty to pay, the law implies a promise."

Carry vs. Curtis, 3 How., 236.

The law is again stated in the same case.

> "Wherever the defendant has received money which is the property of the plaintiff and which the plaintiff is obliged by the ties of natural justice and equity to refund" an action lies.

The liability of the stockholder is not increased at all. In the action for money had and received the law raises a promise to pay.

In the early case, *Kennedy vs. The Baltimore Insurance Company*, the second syllabus states:

> "The action for money had and received is an equitable action and the plaintiff, in support of it, can resort to and prove all equitable circumstances incident to his case, and when money was received by an agent of a corporation an obligation was thereby incurred by the corporation."
>
> 3 HARRIS & JOHNSON, MD., 367.
>
> 6 AM., DEC., 386.

The Supreme Court has stated the doctrine thus:

> "When the law imposes an obligation and implies a promise on its part, to refund the money to its owner, such a promise can be enforced by action. Assumpsit will lie whenever the defendant received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."
>
> BYRNE, ET AL., VS. UNITED STATES, 93 U. S., 642-643.

And the form of the indebtedness or the mode in which it was incurred, is immaterial, and the obligations arising in this manner are binding even on the United States.

UNITED STATES VS. STATE BANK, 96 U. S., 30.

> And, "there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff that he has no right conscientiously to retain."
>
> STATE vs. ST. JOHNBURY, 59 Vt., 332

The utter wantonness of expression by Mr. Morsman, counsel for Morsman appellant, is entirely out of place under the facts of the case. On page number 6 of his brief he says, without any foundation whatever therefor: "The remainder of this large amount of cash was absorbed in the course of this protracted and obviously wasteful liquidation."

These assertions are entirely unjustified and are an attempt to shift the fact of original worthlessness of the assets, into the false idea that the assets became worthless after the borrowing of the money. Mr. Wyman, the cashier, and Mr. Kimball, the president of the American National Bank, acted vigorously and persistently for more than a year and a half in collecting from these assets, and using every effort possible to realize upon the securities and properties of the American. After the collections of the first year all parties began to see how difficult it was to obtain any collections from these assets. After the retirement of Mr. Wyman from the work, Mr. Kimball still persistently pressed the effort to collect, and brought many suits, having Mr. Howard B. Smith, a stockholder and now attorney for appellants Wyman, et al., for his attorney, and the items of expense will show many fees paid to Mr. Smith for his services. In the face of these facts, and after having its cashier and president assisted by the able counsel as above stated, we think it quite unfair and strangely inconsistent to hear counsel assert that any asset was wasted. The trouble is in the fact that the money of the American was invested in many of its loans and by reason of the worthless

character of these loans, the American was truly and really disabled in its finances.

No instance of waste of an asset, no instance of a neglect to press for collection, no instance of the omission of any duty and fidelity on the part of Mr. Wyman or Mr. Kimball, can be shown in this record.

The protracted litigation, if such it is, can be seen for itself and realizing the number and contention of the defendants we feel that complainant is truly alert and vigorous in the prosecution of the suit, to have reached a decree, with all its modifications. This disposes of the assertion of counsel in charging neglect or loss in assets, since this contract was made and reveals clearly that the original and inherent frailty of the assets is the trouble, and that the stockholders are now trying to shift onto the complainant and Union National Bank, a fault existing before the contract was made. And, again, no sincerity can exist in claiming that the Union National Bank has actual possession of these assets, for the contract provides that Mr. Kimball shall have them, and the fact (see Rainey's testimony) is that he had possession at the time of his death. That Mr. Burness then took actual possession of them and under the order of this Court sold and collected the assets coming to him as Trustee, is clearly apparent.

The proceedings were based on the fact of Mr. Kimball's possession and the final order of the Court proceeded on the apparent fact that Mr. Burness had possession, as he testifies he did have.

THF STOCKHOLDERS ARE BOUND EOR THE NOTES AND AGREEMENT OF DECEMBER 21, 1895.

a. Because the agreement was made with authority and in due course of business.

b. Because the stockholders received the benefit of the money, accepted it, and cannot honestly escape contributing to its payment.

Counsel, with his usual ingenuity, has drawn out of this Record a theory under which he hopes to escape liability.

He argues that the transaction of December 21, 1895, was a conditional sale of the assets of the American National Bank, and that the notes in this case were not notes in reality, but just a form, a guaranty evidencing no debt or obligation, for the convenience of the Union National, (p. 46 brief.)

That because the contract says the American National guaranteed the Union National against all loss, "and to that end" agreed to execute and deliver its non-negotiable promissory notes, that these notes were not notes at all, and especially was that true because the Union National was, as far as possible, getting the depositors of the American to bank with it.

We confess we cannot follow the learned counsel in his reasoning. It is impossible to read this contract and the evidence bearing upon it and believe that these notes were meaningless or that the American National was not indebted upon them. The whole course of dealing of the parties was upon the basis of a debt.

Counsel says the assets were "clearly security in addition to the promissory notes," (page 46, brief), but what security is there in a promissory note that is not a note, but merely for "convenience."

No, Your Honors, unfortunate as this transaction has been for the Union National Bank, it never agreed to notes that were not notes or promises to pay that were not promises. Nor did any one of the parties dream that the American National Bank was not liable on these notes.

The testimony of Baird, Wyman and Rainey, quoted by counsel, shows this clearly.

Baird, Director, says, Record, page 151:

> "There yet remained due in order to meet all the obligations of the American National Bank a balance represented by those three notes of $200,000, and those notes were given to secure that balance."

They were returned by Henry F. Wyman, Cashier, and Thomas L. Kimball, President, in the report of the regular stockholders' meeting, (Exhibit 24), in which exhibit the payment of principal and interest on these notes is reported at $22,815.40. So in Exhibit 30, bills payable $167,765.00; so in Exhibit 31; so in Exhibit 33, page 5.

Wyman expressly confirms this in his testimony (page 170, Record), referring to the bills payable, account of July, and the agreement itself shows it in every detail.

But, says Counsel, this was not an indebtedness incurred in the ordinary course of business.

If it was borrowing money just to tide it over its embarrassment it would not have sold all its business and transferred its cash and cash items, etc.

With due deference to the learned counsel, we must submit to the Court that this is not a question whether this borrowing was large or small, whether the result of it was to cause the American National to cease as a going concern, or whether the borrowing was made with liquidation in contemplation or not.

The question is, have the Directors and stockholders of a bank on the verge of collapse and insolvency the right to borrow money and pay their depositors by a pledge of part or all of their assets.

If they have that power then this action was legal beyond question, because the Directors acted and the stockholders ratified it.

Counsel endeavors to distinguish the case of *Schofield vs. State National Bank* 97 Fed., 282, from the case at bar, and says:

> "If the money be borrowed in the usual course and in furtherance of the authorized business of the borrowing bank, the transaction will be *intra vires,* but if it be borrowed for speculation, etc., it would be *ultra vires,*" and, again,
>
> "The Union National Bank knew all the facts and was participant in the illegal purposes."

The purpose was to pay its debts and satisfy its depositors. In that "illegal purpose," says counsel, the Union National Bank "participated."

When counsel, so able and learned as the writer of this brief, is driven to such a claim, his case must be hard, indeed.

If ever money was borrowed for a legal purpose, if ever any bank obtained the benefit of every penny of the money borrowed, the American National did in this case.

But, says counsel, a National Bank when confronted with the fact that it is unable to continue in business, has no power to abdicate its own functions and powers and transfer its assets to others.

In this again counsel is wrong. The National Bank has those rights beyond question. Its only duty is to the Government, its creditors, its stockholders.

The Government assented to this and confirmed it; and by it all the obligations of the Bank to the Government were fulfilled.

By this wise arrangement all its depositors were paid and satisfied.

Its stockholders, by every act, ratified and confirmed this agreement, and Edgar M. Morsman, the client for whom counsel speaks, in express terms ratified this agreement, as

appears by Exhibit 25, page 277, Record, and Edgar M. Morsman is a business man whose good judgment is well known.

When these Directors had fulfilled their obligations to those to whom they were obligated they had a right to cease their efforts.

From the arguments advanced by counsel we think it may be fairly inferred that he concedes that if a bank needed money in order that it might continue to run as a bank, that it could borrow that money from another bank or from an individual, and the act would not be *ultra vires.*

Yet he cannot find any direct statutory authority for the borrowing of money. The Courts, however, hold that it can do so.

STATE VS. FIRST NATL. BANK OF ORLEANS, 88 Fed., 947.

FIRST NATL. BANK VS. EXCHANGE NATL. BANK, 92 U. S., 127.

WESTERN NATL. BANK VS. ARMSTRONG, 152 U. S., 347.

ARMSTRONG VS. CHEMICAL NATL. BANK, 83 Fed., 565.

In the above Armstrong case, in 83 Federal, the borrowing was done by the Vice President, and the money never was turned into the Bank, and the Bank went into the hands of a Receiver, and yet it was upheld.

In that case the syllabus is as follows:

> "The borrowing of money by a bank, though not *illegal,* is so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it the officer or agent acting for the bank had special authority to borrow money."

In the above case of *First National Bank vs. National*

Exchange Bank, 92 U. S., at page 127, the Court construes the meaning of Sec. 5136 of the Banking Act, and, after quoting it, says:

> "Authority is thus given to conduct such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to *meet* all the legitimate *demands* of the business and to enable the bank to conduct its affairs within the general scope of its charter safely and prudently. This necessarily implies the right of a bank to incur *liabilities* in the regular course of its business, as well as to become the creditor of others.
>
> "Its own *obligations* must be met, and debts due to it collected or secured. *The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor.*
>
> "Obligations may be assumed which result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the Board of Directors and the officers and agents of the Bank, and are submitted to their discretion except to the extent that they are restrained by the charter or by-laws. *Banks may do in this behalf whatever natural persons could do under like circumstances.*"

The above language was used by the Supreme Court in disposing of the question as to whether a National Bank in adjusting and compromising contested claims might pay a larger sum than would be exacted in satisfaction of them, so as to thereby obtain a transfer of stocks of railroad and other corporations, in the honest belief that by turning them into

money under more favorable circumstances than then existed, a loss which it might otherwise suffer from the transaction might be averted or diminished.

Counsel for defendants in this case at bar would by their line of argument say, that the above was a pure dealing in stocks of another corporation, and hence *ultra vires.*

It would be strange, inded, if a bank which could thus legitimately acquire stock in various corporations in order to try to prevent further loss to itself and stockholders, cannot borrow money and enter into the contract in this case in order to pay its actual and *bona fide* deposits and bills payable without having the *new* debt *thus* created characterized as *ultra vires* the Bank.

The Supreme Court practically says in the above case that a Bank may do anything a natural person can do in making provision for the payment of its debts. Of course, it could not, if insolvent, secure one creditor to the detriment of another, but as in this case it actually paid *all* creditors by making one new one, and used its "judgment and discretion" in so doing, as this case says it may, it surely has violated no law.

It was clearly within the contemplation of the National Banking Act that a National Bank could *close out* its business as well as *conduct* it.

The construction put upon the law by counsel would give authority to a Bank to borrow money and keep the Bank going, regardless of its interests and those of the stockholders, but no power to borrow money from one to pay the many and then quit business, with no one who could question the transaction.

To show that the National Banking Act contemplates

the borrowing of money and the pledging of assets, look at Sec. 5242, which is as follows:

> "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, securities on real estate, or of judgment or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceedings, in any state, county or municipal court."

It depends then upon what use is made of the money, whether a preference given by an insolvent bank is void or not.

In construing the above section the Fifth Circuit Court of Appeals, McCormick, Judge, holds that a preference given for an actual advance of money which goes to the Bank, and is used for the benefit of the Bank, is good and not void.

Stapleton vs. Stockton, 31 Fed., 326.

In the above case there was a preference of one creditor over others. The receiver tried to set it aside, but failed as to the money advanced at the time.

In our case the money was all advanced at the time and applied to the payment of all the creditors of the Bank in full

theretofore existing, and hence there was no preference over other creditors.

Now, if Sec. 5242 says that a Bank cannot transfer property when insolvent "with a view to prefer a creditor or to prevent the application of its assets in the manner prescribed by the statute," does it follow that if a Bank in distress makes such provision that all its then creditors are paid in full, that it is violating that statute or any other? Is it not doing just what the law would and does require, treating all alike?

In order to do it the American National Bank in this case made itself indebted to one creditor in order that it might pay off all others. It is, it seems to us, folly to say that a Bank has power to run, but no power to stop if it pays all its debts.

We think we have shown that this was a borrowing of money.

This contract cannot be construed in any other way. It was given that interpretation by all parties to it in carrying it out.

The Court will not give it a different interpretation from what the parties themselves have given it, even if it could by any legerdemain be construed to mean anything else.

If the language in this contract is at all ambiguous, the way in which the parties understood it and acted upon it will be of aid to the Court.

> "When the language used by the parties to a contract is ambiguous or of doubtful meaning, the practical interpretation given to it by the parties themselves, when engaged in the performance of the agreement, and before any controversy has arisen concerning it, *is one of the best indications of its true intent.*" (Italics are ours.)
>
> *Schofield vs. State National Bank*, 97 Fed., 285.

Also *Topliff vs. Topliff*, 122 U. S., 121.
Chicago vs. Sheldon, 9 Wall., 50-54.

The case above cited of *Schofield vs. State National Bank* is very similar to the one at bar.

Practically the only difference between that case and this is that that contract or resolutions passed pursuant thereto provided that the Bank assuming the liabilities should not hold the failing Bank nor its stockholders for any deficiency, while in the case at bar the express agreement was to pay the difference, which was made a fixed amount represented by notes bearing interest at a rate certain and payable at a time certain.

The third paragraph of the syllabus in above case is as follows:

> "A contract by a National Bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not *ultra vires*, but is within its powers conferred by statute to conduct a general banking business."

Schofield vs. State Natl. Bank, 97 Fed., 282.

The Court will notice the very great similarity between these two contracts, except the difference heretofore pointed out.

It would seem very strange if a court after deciding that such a contract was not *ultra vires* the Union National Bank, which took all the *chances*, would in this case hold that it was *ultra vires* the American National, when it was simply doing what the law contemplates—taking care of its debts, paying its obligations, keeping good faith with its depositors, meeting its engagements which it could do in no other way.

The State Bank in that case, like the American in this,

was providing for payment of its obligations. The Court did not see fit to in any way criticise their action. They were simply doing what the law expected them to do.

Counsel is not fortunate in his attempt to distinguish between the Schofield case and the case in controversy.

The only real distinction that we can see is that in the Schofield case the express agreement was that the stockholders and Bank should not be liable, and in this case the express agreement was that they should be.

The banks in both cases sold their office furniture, fixtures, safe, etc.

The Union National Bank in both cases took possession of the furniture and office of the selling bank. Both banks assumed the debts of the bank transferring its assets.

In both cases the cash and cash items were immediately turned over. The securities in both cases were to a great extent worthless.

The condition of both the American National Bank and the State Bank was practically the same. Neither had committed any act of insolvency, but both could not pay their debts.

So far as abdication of duties goes the cases are on all fours.

And the case in principle and fact is decisive of the question of power in this cause.

The refinement of reasoning in counsel's brief, where he says he finds nothing justifying a conclusion that there was an indebtedness between the two banks, is able and shrewd, and is perhaps the best that can be said on the subject.

When the Union National had assumed the debts of the American it became liable for that two hundred thousand, and

a debt arose from the American to it, which was secured by the notes and the assets.

We cannot tell how much the Union National had paid on December 23. It may have paid one hundred thousand dollars, or it may have paid less; that is immaterial, but the material thing is that the Union National, a solvent, reliable bank, had become liable to pay over two hundred thousand of obligations, and the American National was released and discharged to that extent.

It has been repeatedly held that the borrowing or loaning of a sum in excess of the legal limit is no defense to a suit for the money borrowed.

Considerable stress is laid upon the case of *Richmond vs. Irons*, where a Trustee, long after a bank had gone into liquidation, endorsed paper to creditors, and it was attempted to hold the stockholders on the endorsement.

It was rightly and justly held that such endorsement in law simply passed the title to the commercial paper transferred and did not have the legal effect of a commercial endorsement.

It is plain that the principle here enunciated would have no bearing upon the act of a Board of Directors done with the full advice and consent of the stockholders and with their approval and sanction prior to the resolution of liquidation.

A great deal is said by counsel about the prolongation of the liability of the stockholders.

Now, this contract in itself did not in any degree prolong the stockholders' liability. If these assets were good these claims could be paid off at once.

If it has been prolonged it was caused by the acts of the stockholders themselves, and the nature of the worthless assets which they have foisted on the Union National.

Neither does it lie in their mouths to complain about the

"important and delicate business of liquidating" being "remitted to the integrity and discretion of Kimball," a man they assented to and insisted upon.

It is also claimed by counsel that his client who signed the express ratification of this contract is not estopped because this act is not pleaded, and says it seems to have been procured by Kimball "for some unexplained reason."

It seems to us it would have been better to have said nothing than to have made this lame explanation.

B

THESE STOCKHOLDERS CANNOT ESCAPE LIABILITY BECAUSE THEY RECEIVED THE BENEFIT OF THIS MONEY, ACCEPED IT, AND CANNOT HONESTLY ESCAPE CONTRIBUTING TO ITS PAYMENT.

The doctrine of *ultra vires* will not be allowed by the Courts to defeat the ends of justice or work a legal wrong.

Railway Company vs. McCarthy, 96 U. S., 267.

Before the Court would be justified in holding a contract of a corporation *ultra vires* it ought first to be satisfied that it is not, in so doing, committing a legal wrong. There is no light in which the transaction between these two banks can be viewed by which this Court can say that either was attempting to work any fraud or harm to the other. It was a pure, simple business deal for the relief of the American in a time of distress. Every dollar received went to pay its indebtedness. So far as any act of the officers, directors or the stockholders of the American are concerned, before or after the bringing of this suit, in the evidence or elsewhere, outside of the an-

swers drawn by the attorneys, which they do not undertake to substantiate by proof, there has never been any complaint.

There has not been, nor can there be an authority produced by respondents showing that when a bank, or any other corporation made an honest, bona fide attempt to pay off its depositors or creditors and did so, that the act by which it obtained the money thus used was held *ultra vires* and the person furnishing the money compelled to lose it.

Even in law cases Courts are very careful about doing injustice in its application of the harsh rule of *ultra vires*, but in an equity case, where all the facts are disclosed by the Bill, as in this case, it would surely be carrying such a rule to the extreme.

The rule of *ultra vires* is often applied to prevent a wrong and just as often, and more so, its application is refused when it will produce a wrong.

Courts of Equity are not sitting to commit, or suffer to be committed "moral wrongs." Their mission is exactly the opposite.

We now wish to quote some authorities upon the proposition above set out, and show that in this case these defendants would be estopped to set up the defense of *ultra vires*, even if there *was* anything in it, having received the benefit of this $201,000.00 and not offering to make restitution.

If this is an *ultra vires* contract let them pay the money advanced for their benefit, and which they have received, and do equity before they ask relief.

> "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."
>
> *Railway Co. vs. McCarthy*, 96 U. S., 258.

The case of *Benseik vs. Thomas*, 66 Fed., page 104, was

a case where a smelting company borrowed money, in direct violation of authority, for the purpose of completing some buildings.

It was held that, although the borrowing was without authority, the doctrine of *ultra vires* would not be applied because they were estopped to deny the authority of the directors to borrow it and were liable for the amount actually received.

This case was decided by the Circuit Court of Appeals, Eighth Circuit, in February, 1895.

The Court in the opinion, at page 110, says:

> "Of this amount, the sum of $10,000 appears to have been used in discharging attachment and mechanics' liens against the company's property. Furthermore, all of the shareholders of the company who took an active interest in its affairs appear to have known that these liens were being paid with money that had been borrowed by some one by authority of the board of directors. Under these circumstances, it is clear, we think, that the smelting company is not in a position to plead 'want of authority' on the part of its board of directors to borrow the money in question, as a defense to a suit by the leaders to recover it. When an act done by a private corporation is not *per se* illegal, or *malum prohibitum*, but is simply *ultra vires*, and is not a matter of public concern, but merely affects the interests of the stockholders, the latter may so act as to deprive themselves of the right to challenge its validity. Thus, in the case of *Kent vs. Mining Co.*, 78 N. Y., 159, a cororation had issued preferred stock to certain of its shareholders in lieu of common stock theretofore held. Although the issuance of such preferred stock was unauthorized, being in violation of a law of the company, yet it was held that holders of common stock who were acquainted with the issue of such preferred stock, and had suffered it to be issued and sold

on the market without taking any steps to arrest the proceeding, were estopped from maintaining an action against the corporation to have the same cancelled. In the case of *Sheldon Hat Blocking Co. vs. Eickemeyer Hat Blocking Machine Co.*, 90 N. Y., 607, the trustee of a manufacturing company had assigned and transferred all of the property of the company in settlement of a judgment against it. All of the stockholders had knowledge of the assignment of the corporate property at or about the time it was made. It was held that, although the trustees had acted without authority in making the assignment, yet, as the shareholders had taken no action to arrest the transfer, and as the act was simply *ultra vires*, they were estopped from maintaining a suit to set the assignment aside. In the case of *Plank Road Co. vs. Murray*, 15 Ill., 336, the facts were that the directors of the company had borrowed money without authority, and had given a mortgage on the company's property to secure it. It was held that inasmuch as the company had received the money and used it, it was estopped from questioning the authority of the officers who had made the loan. Also in *Troup's Case*, 29 Beav., 353, 357, it was decided by the master of the rolls, that, when the directors of a company had no power to borrow money, a person lending money to the company cannot enforce payment of it against the company, unless it has been *bona fide* applied to the purposes of the company, but that, if so applied, a recovery against the company may be had. We conclude, therefore, that because the smelting company received the money that was advanced by Benseik and Wenzel under the authority conferred by the directors to negotiate a loan, and appropriated the same to the payment of its debts and to the completion of its smelting works, the money so advanced is recoverable from the company, and that the by-law above quoted does not

> preclude such a recovery, or impair the validity of the deed of trust as a security for the sum of money actually advanced. A corporation should not be permitted to allege want of authority on the part of its board of directors to borrow money, when it has received a sum of money actually borrowed, and has used it to pay its debts, with full knowledge of the fact on the part of all its directors, and many of its shareholders. A corporation, as well as an individual, is at least bound to act honestly; and it should not be allowed to say that an act done by its officers was unauthorized, when it has accepted the benefits accruing therefrom, and does not offer to restore what it has received."
>
> *Benseik vs. Thomas*, 66 Fed., 110.

The above language is very pertinent to the case at bar. The doctrine there applied is just as applicable to a National Bank as to any other corporation, as is shown in the case of *American National Bank vs. National Wall Paper Co.*, 77 Fed., 85.

In this case a Bank became possessed of a stock of wall paper and formed a corporation to carry on the business. The officers of the wall paper company were also officers of the Bank. The Bank in effect led the creditors to believe that it was behind the new corporation and would guarantee its bills. It afterwards refused to do so and was sued by the National Wall Paper Company for goods purchased. The Bank defended on the ground of *ultra vires*.

Judge Caldwell, on page 93, says:

> "It is next said that the bank had no authority under its charter to buy and sell goods, and that any purchase of goods by the bank, or any one for it, was *ultra vires*, and did not bind the bank. We entertain no doubt of the bank's right to purchase the A. Gau-

thier stock at the sale thereof on the judgment in its favor; and the right to purchase to save a pre-existing debt due the bank carried with it by necessary implication the right to sel l the goods so purchased. How the bank should proceed to dispose of the goods so purchased at the attachment sale, and whether, in order to sell that stock to the best advantage, it could rightly buy fresh goods to mingle with it, we need not inquire; for, conceding that it had no right to purchase any goods, not even those purchased at the attachment sale, its liability to pay for the goods purchased from the plaintiff is not affected on the facts of this case. 'The great mass of judicial authority,' says Judge Thompson, 'seems to be to the effect that, where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it.' Thomp. on Corp., Sec. 6016. Continuing the subject, the learned author further says it is a general principle of law that no party will be permitted to set up the defense of *ultra vires* while retaining the fruits or the benefits of the contract. This doctrine rests upon the unanswerable ground thus stated in Pennsylvania by Mr. Justice Porter: 'A man who has enjoyed a privilege has no right to say that because he ought not to have enjoyed it he will not pay for it. However unlawful the act, it would be unsound policy to give him this immunity.' Id. Sec. 6015. The reason of the rule is that honesty and fair dealing are the highest public policy, and that a private corporation, which is a mere collection of individuals, is no more privileged to repudiate its engagements, and act dishonestly, than a single individual is. Id. Sec. 6017. Where, therefore, a corporation purchases property contrary to a prohibition,

or without an authorization in its charter, it cannot retain the property and refuse to pay the price, or set up the defense of *ultra vires* when sued for the same. Id. Sec. 6018. The authorities supporting the text of the learned author are too numerous to require citation. The doctrine has become familiar learning."

American Natl. Bank vs. Natl. Wall Paper Co., 77 Fed., 93.

In the case of *The Sheldon Hat Blocking Company vs. The Eickemeyer Hat Blocking Machine Company*, in 90 N. Y., the Court, at page 613, referring to another case, says:

"It was there held that the acts of a corporation which were not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them dealing in good faith with the corporation will be protected in a reliance on these acts. That it is not needed in such a case that there be an express assent on the part of the stockholders to work an equitable estoppel upon them. Where they neglect to promptly and *actively condemn* the unauthorized act and to seek judicial redress after knowledge of the commission of it, and if innocent third parties have been led thereby to put themselves in a position from which they cannot be taken, without loss, if the act were held invalid, the stockholders will be estopped from questioning it."

Sheldon Hat Blocking Co. vs. Eickemeyer Hat Blocking Machine Co., 90 N. Y., 613.

We also call attention to the case of *Farmers Loan & Trust Co. vs. Toledo A. A. N. & M. Ry. Co.*, 67 Fed., 49, the syllabus of the case being as follows:

"In an action to foreclose a mortgage securing bonds of a consolidated railroad corporation of Ohio

and Michigan, where, from the time of the consolidation, it exercised the franchise of a consolidated corporation, without objection from the State, or the stockholders, who appeared and voted as its stockholders at its annual meetings, it is a *de facto* corporation, though there was a failure to give the notice to stockholders, or to file the certificate of consolidation required by Rev. St. Ohio, Secs. 3380-3382, and both such *de facto* corporation and its stockholders are estopped to assail its unauthorized existence as a corporation to avoid the bonds."

Farmers Loan & Trust Co. vs. Toledo A. A. & N. N. M. Ry. Co., 67 Fed., 49.

It seems to us that under the undisputed facts in this case and the construction that must be put upon this contract by the Court, being the construction put upon it by the parties themselves, this Court cannot possibly come to any other conclusion than that these stockholders are liable for an assessment and judgment in this case sufficient to pay the amount of money advanced by the Union National Bank for the benefit of the American.

LIABILITY OF SHAREHOLDERS.

The liability of shareholders is for all "contracts, debts and engagements" of the Bank. This liability is fixed by Secs. 5151 of the Revised Statutes, and is as follows:

> "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking

> association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions from Chapter four of this Title."

Rev. Stat. U. S., Sec. 5151.

The liability may be enforced by a creditor on behalf of himself and all other creditors, as provided for in Sec. 27 of the Act of 1876, which is as follows:

> "That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes, may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any Court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The liability incurred under the circumstances of this case before the Bank went into voluntary liquidation is certainly a "contract," a "debt" or an "engagement" of the Bank. Under

these authorities and fact this contract was legally and morally binding upon these stockholders.

Without following further counsel in the special pleading, by which he endeavors to escape this obligation on the part of the shareholders, we quote the language of the Court of Appeals, 135 Federal, 295, where they say, "EVERY CONSIDERATION OF EQUITY, GOOD CONSCIENCE AND JUSTICE LEADS TO THE CONCLUSION THAT THE SHAREHOLDERS SHOULD BE HELD TO HAVE RATIFIED AND APPROVED WHAT WAS DONE AND WHAT WAS BEING DONE."

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals for the Eighth Circuit, in an opinion to which we can add nothing, affirmed the decision of the Circuit Court below, this opinion appearing in this record and reported in 135 Federal Reporter, page 288.

Counsel for Morseman, on pages 18, 19 and 20 of the brief, has argued with some elaboration against the view expressed by that opinion, but it will be seen upon examination that counsel's line of argument is entirely opposed to the course of judicial decision and would if adopted relegate the law relating to the winding up of the National Banks to the State Courts in most instances, and deprive these laws of the uniform character, which was intended to be maintained by the Federal control.

This contention is opposed, not only to the purpose and object of these statutes, but to the uniform construction of the Federal Courts in every case which has come before them.

A long argument is also made to show that because Kimball was agreed on as the agent to liquidate that therefore the American had nothing to do with the liquidation. This claim

is on a par with many others made by the defendants in their attempts to escape liability.

The American National Bank insisted on Kimball retaining the assets and making the liquidation, appointed him their agent to liquidate and controlled that liquidation through Kimball down to the day of his death.

Every Bank that appoints an agent under the law to liquidate parts with its control. The American did neither more nor less than any other insolvent and liquidating Bank.

Every insolvent Bank loses its control. But to argue that because this Bank by reason of its insolvency and inability to do business can therefore escape its debts or avoid its contracts would be to offer a premium on insolvency and a prize for incompetency.

It is further claimed that there is no jurisdiction under the act of Aug. 13, 1888.

We have read with diligence the argument of counsel under this head, but with due deference to the learned and able counsel we cannot catch the distinction attempted to be made in his argument. Certainly the bill in this case sets out a suit against this insolvent National Bank, to enforce a specific lien, to call the Bank into Court, and to reach by judicial process not only the tangible assets in the hands of the agent and trustee, but also the fund available by law in the ratable liability of the stockholders, and having by process taken these questions and assets into Court to have them by proper decree administered and distributed and the affairs of the Bank wound up. That this presents a Federal question and carries jurisdiction cannot be fairly denied and the cases so universally hold.

Connected with this argument it is attempted by statement and intimation many times in the brief to eliminate Kim-

ball as the agent of the American National Bank and put him forward as the representative of the Union National Bank. Thus on page 28 the statement that "the assets at the time of the commencement of the suit were in the possession of the Union National Bank"—on page 27, "the fact that Kimball was president of the American National is unimportant." On page 26, "having agreed that the Union National should conduct the liquidation under the direction of Kimball." "Kimball as agent for both parties,' page 26, and other like statements.

Now all these statements are incorrect. The assets were not in the possession of the Union National Bank at the time of the commencement of this suit or any other time. The fact that Kimball was the president of the American National Bank is not unimportant. It is important because it indicates why he was chosen by the American National Bank to liquidate its affffairs as its agent, and because the agreement expressly provides: *"The party of the second part shall have and hold said assets and profits subject to the right of said Thomas L. Kimball, or his successor, to collect and convert the same into cash for the uses and purposes hereinbefore expressed."* See agreement, page 5, this brief.

And that Kimball, "or his successor, shall represent in said liquidation the stockholders of the party of the first part, *and shall receive, hold and use the proceeds of the assets of the party of the first part as trustee of the parties hereto for the mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary court charges and attorneys fees attending such liquidation shall be incurred under the direction of the said Kimball or his successor.*

UNDER THIS CONTRACT KIMBALL HAD THE SOLE RIGHT TO COLLECT AND CONVERT INTO CASH AND IN SO DOING HE REPRESENTED THE STOCKHOLDERS OF THE PARTY OF THE FIRST PART. BUT HE RECEIVED, HELD AND USED THE PROCEEDS AS TRUSTEE OF BOTH.

The liquidation was entirely under his control as the representative of the American National Bank. His only duty to the Union was to pay over the proceeds, as trustee. With these indisputable facts in our minds we may eliminate all the argument about the American Bank having nothing to liquidate and about its having no control. It had all the control; it named its agent, its agent managed the liquidation and controlled the expenses thereof.

He managed these assets as agent of the stockholders, as an agent under the Federal law, and as a Trustee of the proceeds, and the contract was expressly arranged so as not to conflict with his agency and representative of the stockholders of the American National Bank under the liquidating proceedings.

The proceedings in voluntary liquidation adopted by the American National Bank were in pursuance of the contract with the Union National Bank, were strictly in accordance with law, and by means of these proceedings Kimball was an agent under the Federal Statute, as well as a Trustee under this agreement. This was the view taken by the Court of Appeals. See 135, Federal, page 294, and is the only view that can be taken of these facts.

From its inception this case shows a controversy arising under the laws of the United States, equities to be adjusted under these laws, funds to be collected and administered under

such laws, and a bank business to be administered and wound up.

The cases cited in the opinion rendered by the Court of Appeals below in support of its opinion and judgment in this case contain no case so strong as the case at bar.

Under agreement in the Court below these cases were all tried together; we suppose that agreement still holds, but, however that may be, we see no object in filing more than one brief in these various causes depending, as they do, upon the same record, and coming up on appeal from the same decree.

THE BRIEF OF MR. SMITH.

Our brief thus far was prepared in answer to that of Mr. Morsman, and we will now consider as briefly as possible the argument and brief of Mr. Smith.

It is first contended by Counsel for Wyman and Frenzer that the Court below was without jurisdiction, for the following reasons:

1. Because the American National Bank had not gone into voluntary liquidation.

2. That no bill had been filed by a creditor in the nature of a creditor's bill.

3. Because the defendant has been denied the right to trial by jury.

4. Because an action by a creditor conflicts with the United States Banking law.

5. Because the federal statutes indicate that the proceeding by a stockholder is simply ancillary.

6. Because the creditors in this case, claiming a lien

upon all the assets, could not file a bill in behalf of all other creditors.

The objections set out numbered fourth and fifth we do not wish to particularly refer to; the fourth, because it has been covered by what has been heretofore said, the third because the question has been settled so often that it is hardly open to discussion.

We shall treat these in their order:

THEAMERICAN DID NOT GO INTO VOLUNTARY LIQUIDATION.

To say that the American National Bank did not go into voluntary liquidation is, it seems to us, treating facts but lightly.

On January 14, 1896, at the regular annual meeting of the stockholders, the following resolutions were passed:

> "Resolved, That the directors of the American National Bank, of Omaha, Nebraska, be and hereby are instructed to take action looking to the liquidation required by law."

On January 17, 1896, the Board of Directors met and issued the following to the stockholders:

> "Resolved, That the American National Bank of Omaha, Nebraska, be placed in voluntary liquidation, under the provisions of Sections 5220 and 5221, U. S. Revised Statutes, to take effect the 25th day of February, 1896, and that Thos. L. Kimball be, and hereby is, appointed the agent and trustee of the shareholders of said bank to effect such liquidation.
>
> "It is desired that each shareholder be personally present or represented by proxy at the called meeting. No officer or director of the bank can act as proxy, and

it is suggested that Mr. John L. McCague or Mr. Alex. G. Charlton are eligible to vote your stock."

On February 25, 1896, the stockholders met, and by a vote of 1639¾ aye, and 56¼ no, passed the resolution, page 266, record.

The Comptroller was duly notified, page 267, record, and the liquidation was approved by James H. Eckels, page 269, record.

After such a record it seems unnecessary to further comment on this claim.

But, it is said, this liquidation was a sham and pretense; there was nothing to liquidate.

To this we might well answer, it is immaterial how much a bank has when it liquidates, it is the fact of its going into liquidation that is material, and stop at that.

But the contention is untrue in fact. The agreement between the Union National Bank and the American expressly provided that the liquidation of these assets assigned and transferred to secure the three notes of $67,000 each was to be under the control of T. L. Kimball, the President of the American National Bank, and the agent and trustee of that Bank under the resolution of the stockholders of January 17, 1896.

The agreement between the two banks expressly says on this point:

> "That such liquidation shall be conducted under the direction of Thomas L. Kimball, or such other person as may be agreed upon, *on behalf of the stockholders of the party of the first part* (the American), it being understood and agreed that said Kimball, or his successor, *shall represent in such liquidation the stockholders of the party of the first part, and shall receive, hold and use the proceeds* of the assets of the party of the first part *as trustee of the parties hereto* for the

mutual protection of the rights of each in accordance with the terms and conditions of this agreement, and that all necessary Court charges and attorney's fees attending said liquidation shall be incurred under the direction of the said Kimball, or his successor."

The language of this contract makes the marked distinction between the assets before liquidation and the proceeds after they are liquidated and become money.

As to the assets and the liquidation, they were held and conducted by Thomas L. Kimball, or some one to be agreed upon in behalf of the stockholders of the American National Bank, and in that possession and liquidation he represented them alone.

But as to the proceeds, he received, held and used them as trustee of both parties under the agreement.

From this it is clear that Kimball held all these assets for the stockholders of the party of the first part, but was a Trustee for both of the proceeds, bound as to such proceeds to the trust created by the agreement.

And so carefully was this right guarded that in clause three (record, page 252) even the ordinary clause usual in all forms of assignment, mortgage and pledge, where the agreement says, the party of the first part agrees to sell and assign, etc., is immediately followed by the words, "with the understanding and agreement that the party of the second part shall have and hold such assets *subject to the right of the said Thomas L. Kimball*, or his successor, to convert the same into cash for the uses and purposes hereinbefore expressed.

Not only did the American resolve to liquidate, but it preserved in the hands of its own agent and trustee the control of that liquidation in the strongest possible language, and until the day of his death Kimball controlled the assets of the American National Bank, collected its money and paid it out.

THE CONTENTION THAT THE STATUTE MEANS A JUDGMENT CREDITOR IS UNSOUND, AND THE FEDERAL COURT ON THE EQUITY SIDE HAS JURISDICTION TO SUSTAIN A BILL BROUGHT BY A GENERAL CREDITOR UNDER THE STATUTE.

It is argued in appellant's brief that the language "may be enforced by any creditor of such association by bill in equity in the nature of a creditor's bill," means only a judgment creditor.

This contention not only is in the face of the statute which plainly says *any creditor*, but it is plainly antagonistic to the purpose of the statute.

Without this statute, as has been held in *King vs. Pomeroy*, the judgment creditor or lien holder might maintain his bill in equity. This statute did not take away any equitable rights.

But because, to exhaust the remedy at law in cases like these of National Banks, would practically destroy the benefit to the creditor, this statute was passed giving to *any creditor* the right to file a bill in the nature of a creditor's bill, thus affording a speedy and efficient remedy to a creditor.

A line of decisions lately rendered in the Federal Court in analogous cases, in which these principles are adjudged and approved, will be found in:

Darrigh vs. H. Wetter Manf. Co., 78 Fed., 7;
Nat. Security Co. vs. State Bank, 120 Fed., 593,
and
Jones vs. Mutual Fidelity Co., 123 Fed., 508.

In these cases the argument of counsel that there can be no creditor's bill in a Federal Court, unless the creditor has

reduced his claim to judgment, are considered and held to be without merit; the very line of cases cited by counsel, *Hollins vs. Brierford Co. & I. Co., Scott vs. Neely*, being considered and shown not to be in point.

And these decisions were in cases where the right sought to be enforced was created by a State Statute, while in the case at bar the jurisdiction is expressly conferred by Federal Statute, and the right to any creditor to file a bill in the nature of a creditor's bill in that forum is given in terms; a very much stronger case.

The reasoning of these opinions is able and convincing, and commends itself to common sense, and to those who believe that law should be so construed as to be beneficial and remedial.

In *Darrigh vs. H. Wetter Manf. Co.*, Sanborn, Judge, says:

> "Rights created or provided by the statutes of the states to be pursued in the State Courts may be enforced and administered in the Federal Courts, either at law, in equity, or in admiralty, as the nature of the new rights may require. * * * An enlargement of equitable rights by the statutes of the states may be administered by the national Courts as well as by the Courts of the states. * * * 'A party, by going into a national Court, does not lose any right or appropriate remedy of which he might have availed himself in the state Courts of the same locality.' * * * Tested by these rules, the jurisdiction and power of the Circuit Court of the United States to seize and sell the property of this insolvent corporation, at the suit of a simple contract-creditor, under the statutes of the State of Arkansas is not doubted. Creditors and stockholders had no right, without such a statute, to have a receiver of a corporation appointed, to have its property sold,

and to have its proceeds distributed pro rata among its creditors, simply because it was insolvent. The statute created that right."

And again:

"It deprived every creditor of the right to collect his debt of an insolvent corporation by an action at law, an attachment or a judgment. It made every lien he obtained according to the course of the common law void, if it was attacked within ninety days after it was 'sought to be otbained.' * * * Moreover, if a creditor was first required to obtain judgment and a return of an execution *nulla bona* before he could proceed under this statute in the Federal Court, he would, in effect, be deprived of the right to proceed at all. His execution could generally be levied upon sufficient property of the insolvent corporation to satisfy his debt, so that he could not obtain a return *nulla bona*, and therefore could not proceed in equity. Yet his judgment and execution would be futile, because some other creditor or some stockholder would proceed under the statute to vacate his judgment and thus he would be deprived of all remedy against an insolvent corporation in the national Courts, either at law or in equity."

In *Jones vs. Mutual Fidelity Company*, Bradford, Judge, in the course of an exhaustive opinion, says:

"There are two points of difference between the Arkansas statute and the Delaware statute. Both statutes create a substantial equitable right and an equitable remedy for its enforcement, but, while the Arkansas statute expressly renders nugatory such proceedings at law as are calculated to defeat the statutory right, the Delaware statute does not expressly do so. The right conferred by the latter statute is, however, wholly inconsistent with and practically would be nullified by an exhaustion of a legal remedy on the pecuniary

> demands of creditors. In either case an exhaustion of a legal remedy would be inconsistent with the due administration of the statute and destructive of the right thus conferred."

And again he says:

> "But I know of no case in which the proposition, either in terms or in substance, has been advanced that, where the object of the suit is the enforcement of a substantial right in equity created by a state statute, and the exhaustion of a legal remedy would necessarily defeat the object of the suit, such legal proceedings would furnish a plain, adequate and complete remedy for attaining the object of the suit, such a proposition on its face is an absurdity."

Jones vs. Mutual Fidelity Co., 123 Fed., 527.

The reasoning in these cases under the State Statutes applies with double force to the case at bar under the Federal Statute. In neither could the creditor derive any preference from his judgment or action, in both the delay by such action would render the benefit of the Statute nugatory.

Applying these rules to the case at bar; what must the Court do to sustain the contention of these defendants?

The Court must hold that the creditor must bring suit and have a jury trial and judgment and execution before he can proceed against these assets and to enforce his claim against these stockholders, such legal proceedings would necessarily, by delay, defeat the object and purposes of the suit and such ruling "would be an absurdity on its face."

In order to be able to commit this absurdity and deprive the statute of its plain meaning, this Court must change the meaning of the statute and say, when the law says any creditor, it means any judgment creditor.

And finally this Court must say, we can enforce a gen-

eral statute of a State on the equity side of the Federal Court giving a general creditor equitable relief. But we cannot do it under a Federal statute expressly authorizing the procedure, and in terms giving and granting equity jurisdiction therefor.

It appears to us scarcely necessary to do more than clearly set out this argument to refute it.

Equally without merit are the claims that defendants have been deprived of jury trial, or that under our construction of the law a creditor for a small amount might inflict great hardship.

Neither is there any force in the contention that the Court had no jurisdiction of the Bank; that we have answered before, and in the *King-Pomeroy* case the Bank was declared to be a necessary party to fix the various liabilities.

Again, we do not agree with counsel in his contention that there is no jurisdiction through the general equity powers of the Court. While it is true that this bill, as we have shown, under the Federal Statute, gave the Court jurisdiction, we have no doubt that this suit, covering, as it did, the enforcement of our contract lien, the disposition of the remaining assets of a National Bank, and seeking by its prayer the enforcement of the trust and lien, the sale of the tangible property, and the ascertainment of the fund to come from the stockholders ratably, carried with it jurisdiction by reason of this trust under the general equity powers of the Court had there been no Federal Statute specifically authorizing it.

This evident truth cannot be more strongly asserted than by the language of Judge Sanborn in *King vs. Pomeroy*, 121 Federal, 291, where he says: "This liability of stockholders is as much a trust fund or the pledge of a trust fund for the benefit of creditors, as any of the tangible property of the corporation, and the enforcement of this liability and the dis-

tribution of the proceeds as much a part of the liquidation of the debts of the bank as the collection or distribution of the proceeds of the bills receivable, or any other assets."

And in the same case he says the ascertainment of the debts and liabilities of the bank and the judicial determination of the necessity, and the requisite extent of the enforcement of the stockholders' liability are essential prerequisites to the collection of the amounts owing by them, and the insolvent bank is a necessary party to these adjudications.

King vs. Pomeroy, 121 Fed., 295.

Under this rule the cases all say that the general creditor interested in a trust fund, or having a lien thereon, can enforce the trust under the general equity powers of the Court.

And in the case of a National Bank the Federal Court alone can adjudicate the ratable liability of the stockholders and distribute the assets.

So that on every ground the jurisdiction of the Circuit Court was clear to adjudge and determine this matter under its general equity powers for the purpose and under the principles laid down by Judge Sanborn as above, and under the Federal Statute affording an adequate remedy and speedy adjustment of the rights of the parties.

Upon either or both of these grounds the jurisdiction of the Circuit Court was clear and certain.

THE QUESTION OF WALLACE BEING THE ASSIGNEE OF THE NOTE IS IMMATERIAL. THIS ACTION IN ANY ASPECT IS FEDERAL IN ITS CHARACTER AND CARRIES WITH IT JURISDICTION IN THE CIRCUIT COURT.

As we have already presented this question in the first part of this brief, we will dismiss it with a few words.

Any suit brought by a creditor to enforce a liability of a stockholder of a National Bank, or for the purpose of winding up a National Bank and distributing its assets, is one within the jurisdiction and cognizance of the Circuit Court of the District where the Bank is located.

This suit is both, and maintainable upon either ground.

We confess to being somewhat dull of comprehension as to the exact meaning of clause 6 on page 28 of the brief of counsel for Wyman, et al. We see no reason why a sole creditor could not file a bill for himself and all other creditors. If there were no other creditors no harm would result. We think counsel's fears in this matter actuated more by a desire to escape the judgment below than by any particular difficulty in this case.

Neither do we agree that "if complainant had appealed to the general equity jurisdiction of the United States Court he would have failed." We think the trust in the assets of the American National Bank and the trust fund pledged by the stockholders would, under the rulings of this Court, sustain this suit even in that aspect.

But, as we have said before, we have ample authority for this suit under the Federal Statutes and the jurisdiction granted thereby.

The decree is correct in holding these defendants as shareholders. The acts of the officers were proper and within their authority.

Defendants under this head cite several cases where the power of a bank to take stock for a doubtful debt. 92 U. S., 122. To borrow money temporarily, *Western National vs. University*. To discount notes, *U. S. National Bank vs. First National Bank*, 27 U. S., App., and 49 U. S. App., affirmed in

U. S. Supt. Ct. 174 U. S., 125, *Anten vs. U. S. Nat. Bk.* and *Aldrick vs. Chemical Natl.*, 176 U. S.

In all these cases the Court sustained the power and held the Bank liable.

But, says counsel, page 37 brief: This was done in good faith. The money was borrowed by the Bank, it was used by the Bank, etc. Let us say to counsel there is not a case there cited as strong as the case at bar.

In this case, at the request of the directors of the American National Bank, to save it and its depositors, the Union National paid out $201,000, and paid every debt of the American, taking the American's notes for it, secured by its tangible assets.

This contract made by the directors was brought before the stockholders of the American, and they expressed the approval of it in the meeting, and with but one dissenting vote ratified it by electing the selected man under the contract as the stockholders' trustee to carry it out; ratified it again by the acceptance of $201,000 worth of benefits paid to save them from immediate and overwhelming ruin.

We should indeed inquire the purpose for which this money was borrowed and when we find that it was borrowed to pay the debts of the American National bank and that it did pay those debts, as this record show without dispute, no court of conscience will chop straws about the responsibility.

It is asserted, somewhat unnecessarily, it appears to us, under the facts in record, that it was necessary for the complainants to show the statements and advises of the various state and county officials who had funds in the American. We think not. The record shows that the county officials had good reason for their fears.

Upon page 35 counsel says that Complainant had not shown that the Union National Bank had paid the obligations

of the American. On the contrary, the proof shows that the Union paid the debts of the American.

The proof is abundant that the contract of the Union to pay the indebtedness of the American was carried out.

(Wyman's testimony, record, page 178.)

One hundred and fifty thousand dollars was paid within thirty days after the agreement was made.

(Rainey's testimony, record, page 196.)

(Wattles' testimony, page 241.)

And the Court found that the only indebtedness of the American National Bank was $194,466.35, the sums it owed on the three notes due to Sumner Wallace, $46,524.83, to the Union National Bank, $147,941.52. (Record, page 132.)

Some complaint is made by the defendant of the slowness of the liquidation. But it was conducted by Kimball, a man representing the defendants only in the collection of this money, and specially selected by the defendant.

No one has suffered more by reason thereof than the Union National Bank who loaned this money to pay off these depositors.

The cases in the Federal Court without exception sustain the liability of a National Bank for money obtained by discount, by borrowing, and the attempt of counsel to distinguish between them is without merit.

As near as we can understand the argument of Counsel in his analysis of the authorities from his brief, it is that it was not the business of the American National Bank to pay its depositors; that an arrangement by which these directors paid them was a fraud upon the stockholders, as *ultra vires*. In this, however, we think the Court will not agree with them.

THE TRANSACTION IN THIS CASE AND THE DEFENSE OF ULTRA VIRES AND RESTRICTED LIABILITY OF STOCKHOLDERS.

In December, 1895, the American National Bank was embarrassed and financially insolvent. Its danger was imminent and overwhelming.

Through its principal stockholder, William Minot, and Mr. Baird, one of the directors, it appealed to the Union National Bank for relief.

The Union National Bank, under the agreement in writing, in evidence in this case, advanced to that Bank $240,000 in money, and paid off the depositors of the American and its other debts.

To these advances it received cash items about $39,000, and for the balance three notes of $67,000 each, one of which is now held by the Complainant Wallace.

To secure these three notes the assets were pledged to the Union National Bank by the usual words, but by express contract they did not pass to the Union National as is customary in such cases, but were to be controlled and collected by Thomas L. Kimball, the president of the American, who, by a resolution passed a little later, was made agent and trustee of the American National Bank.

This agreement was by vote of the Board of Directors, and was approved by the conduct and action of the stockholders, and under this agreement the American National obtained $200,000 of the money of the Union National Bank in the hour of its need.

At the time these assets were pledged for these notes, it was believed that they were more than ample to pay them. Their worthlessness, however, soon became apparent, and not-

withstanding the utmost efforts of Mr. Kimball the deficiency upon these notes was $194,466.35.

It is now contended that this contract was *ultra vires* the American, and that even conceding it binds the American National, it is not a liability of the stockholders.

As conceded by the defendants, a National Bank has authority to borrow money for proper purposes. This Bank by this contract did borrow money. The only question remaining is, was it for a proper purpose?

If to pay the depositors and to satisfy the debts of the Bank is not a proper purpose then it is impossible to conceive one.

The first duty of the American National Bank was to those it owed, and by this contract they were saved and paid.

And these stockholders were liable to pay these depositors. It was an obligation for which they were bound.

Not only so, but all these stockholders ratified this agreement, some even in express terms, and all by their conduct and actions.

Counsel, on page 59 of this brief, makes a somewhat naive argument for several of his clients, who, in express terms, ratified this agreement. They ratified it, says counsel, because they thought the assets would pay off the debts, and therefore they ought not to be held "by this paper evidence."

We think counsel should have gone a little further back and claimed that they should not be held because when they subscribed for this stock they thought they were going to make money.

But, however that may be, we do not think the stockholder who signed this paper is held any more than the others. They all knew it; they all took the benefit of it; they all

stood by while the bank's debts were paid off; assented to it; agreed to it, and ratified it, and they are all held for it. Not one of them has the face to come forward and deny that they knew of all these facts and assented to them.

When any bank becomes embarrassed, it is out of the ordinary it is true, but it is strictly within the business and duty of the directors to borrow money and pay the depositors; it is the highest duty they have.

It is probable from the evidence in this case that all the parties thought this borrowing would be temporary, and the tangible assets would pay it off. But are we to say that because the tangible assets were worthless the stockholders are to be relieved from paying; that because the Bank did not continue business it should not pay its honest debts.

But now, after these debts are all paid off, after the Union National has put over two hundred thousand dollars into this contract, and stands to lose, even if it wins this suit, over one hundred thousand dollars, these stockholders by every technicality in their power, resist contributing to this loss.

They aver that the arrangement by which their directors paid the depositors was not in the ordinary course of business of the Bank; that it was not a temporary borrowing, and has taken a long time; that the assets have not paid the notes as they really expected they would; that, having made this contract, the Bank did not continue business as it should.

That they are deprived of a right to a trial by jury; that a creditor might only claim to be one and not be really so; that the complainants did not present the notes for payment to the association, etc., etc., etc. All these are trivial and sufficiently without merit. But it remains for counsel for Wyman and Frenzer to out Herod Herod with this statement on page 21.

1. Ratification by implication is founded upon estoppel

and the doctrines of estoppel can be applied only to persons individually, not en masse. No official action was taken by the shareholders in meeting assembled and none of these appellants did or failed to do anything from which ratification could be implied. Their silence could not affect their rights, as the duty to speak was not imposed on them. Nor would protest or action have benefited either them or the Union. They received no benefits from the transaction, but if they had the benefits were not the result of their desire or their action.

2. There was no express ratification such as could give validity to the original transaction, because the shareholders signed Exhibit 25 individually. Nor does that paper, which was signed by some shareholders only, impose any new contractual liability upon them. Nor does it estop them, because it was not intended to do so and was not an inducement to the Union to change its position.

If this statment is made seriously it is, in its way, unique. First, the stockholders who attended the meetings and in a body expressed their approval, acted en masse, and therefore cannot be held to have ratified. Second, the stockholders who expressly, in writing, ratified the contract (see Exhibit 25), of whom Wyman was one, cannot be estopped or held to have ratified because they acted individually. So that neither, by combined or individual action, can they be held to have ratified the acts of the Bank.

It is, moreover, a strange sense of moral obligation that argues in a Court of Equity that these stockholders could thus obtain over two hundred thousand dollars to pay their obligations, and then repudiate the transaction into which they had invited the other party, by their acts and conduct. Well may the Court of Appeals say, it is not necessary to enquire further, *"Every consideration of equity, good conscience and justice leads to the conclusion that the shareholders should be*

held to have ratified and approved of what was done and what was being done."

DO THE STATUTES RELATING TO NATIONAL BANKS REQUIRE THAT SUCH A DEFENSE BE SUSTAINED.

This was the language of Mr. Justice Harlan, in the case of *Aldrich vs. The Chemical National Bank*, 176 U. S., 618.

It was language used in reference to a case in which the president of the Bank had, through manipulation, defrauded the Bank of $300,000.

It was the language used when the stockholders had some cause of complaint; and where the Court held that the borrowing was without authority.

The Court in this case brushes away the technicalities under which this wrongful defense is attempted in the following language:

> "These powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had specific authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,-

000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. * * *

"We have, then, a case in which a national bank having used in its business money which its vice-president obtained as a loan to it from another national bank denies all liability to account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defense be sustained? This question is recognized by the Court as one of great importance, and has received careful consideration in the light of the adjudged cases. We preceed to the examination of these cases.

In *Merchants Nat. Bank vs. State Nat. Bank*, 10 Wall., 604, 644, 19 L. ed., 1008, 1028, in which one of the questions was as to the liability of a bank on account of certain certificates issued by its cashier and of certain purchases of gold made by him, the Court said that if the certificates and the gold actually went into the bank which the cashier assumed to represent, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase.

"In *Marsh vs. Fulton County*, 10 Wall., 676, 684, 19 L. ed., 1040, 1043, it was held that 'the obligation

to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' * * * *

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical National was obtained under a loan negotiated by the vice-president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank having enjoyed the fruits of the transaction, cannot avoid accountability to the New York Bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. When, as the result of its arrangement with Harper as vice-president, the Chemical Bank credited the Fidelity Bank on its books with the sum of $300,000 the former thereby undertook to pay the checks of the latter to the extent of that credit. And, as already stated, that credit was fully exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. If the latter bank in this way used the money obtained from the Chemical National, it is under an implied obligation to pay it back, or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. * * * If sued by the borrower for the amount of such surplus, could the bank successfully resist the payment on the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business

and for its benefit money obtained by one of its officers from another bank under the pretense of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing. If the Fidelity Bank did not itself borrow this money from the Chemical Bank, although the latter bank in good faith believed that it did, then the crediting of the former upon the books of the latter with $300,000 was a mistake of which the Fidelity Bank was not entitled in equity and good conscience to take advantage, and from which it should not be permitted to derive profit to the prejudice of the other bank. So, if the Fidelity Bank took the benefit of that credit with knowledge of all the facts, then its defense is without excuse and immoral. If it innocently availed itself of that credit without knowledge of the facts, the principles of natural justice demand that it be held accountable for the money of another bank which it used in its business without giving any consideration therefor."

Aldrich vs. Chemical National Bank, 176 U. S. Sup. Ct., 618.

If this is the language of the Supreme Court in a case where the borrowing had been without authority where the act of borrowing was not only without authority, but resulted in a great loss to the Bank itself, what shall we say of this case, where the borrowing was by vote of the Board of Directors with the consent and approval of the stockholders in their meeting and elsewhere; where every dollar went for the benefit of the American National Bank, and the stockholders; where everything was in good faith from beginning to end?

What shall we say of the defense made here; a defense which the counsel who wrote this brief said, when he argued this case below, might result in a moral wrong, but would be legal?

We do not think this defense can or will be sustained. Having had the benefit of this the stockholders must contribute. Any other course would be immoral and in violation of common honesty in business transactions.

Any other course would violate "every consideration of equity, good conscience and justice."

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